Irving L. Berg (SBN 36273)
THE BERG LAW GROUP
145 Town Center, PMB 493
Corte Madera, California 94925
(415) 924-0742
(415) 891-8208 (Fax)
irvberg@comcast.net (e-mail)

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DAMARIS CRUZ, individually and on behalf of all others similarly situated,

Plaintiff,

v.

MRC RECEIVABLES CORP.; MIDLAND CREDIT MANAGEMENT, INC.; A. SYRAN, an individual,

Defendants.
/

Case No.: C 07-05688 SC

PLAINTIFF'S RESPONSE TO DEFENDANTS' SUMMARY JUDGMENT MOTION AND PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Date: March 21, 2008
Time: 10:00 a.m.
Dept: Courtroom 1, 17th Floor
Judge: Hon. Samuel Conti

Pursuant to F. R. Civ. P., Rule 56, Plaintiff Damaris Cruz, on behalf of herself and all others similarly situated, moves this honorable Court for entry of summary judgment against Defendants as to liability. Plaintiff submits that there are no genuine issues of material fact; that she is entitled to judgment as a matter of law; and that Defendants' motion must be denied.

In support of summary judgment, Plaintiff incorporates the Memorandum of Law and Declaration of Damaris Cruz filed concurrently; all pleadings filed in the action; and such other evidence as may be admitted at the hearing hereof.

Dated: 2/27/08

/s/
Irving L. Berg

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145 Town Center, PMB 493
Corte Madera, California 94925
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(415) 891-8208 (Fax)
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THE BERG LAW GROUP
145 Town Center, PMB 493
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I. INTRODUCTION

Plaintiff, Damaris Cruz, has filed a class action complaint, pursuant to the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. § 1692k.

Ms. Cruz alleges Defendant Midland Credit Management, Inc. ("MCM"), on behalf of its affiliated entities, constructed collection letters which purported to be authored for the consumer recipients by A. Syran, Senior Vice President, Operations and Marketing (Complaint, Exhibits A, C, E). In fact, the corporate officer had nothing to do with the construction or the sending of the letters, nor collection of the respective accounts. The Syran declaration (Doc 17) does not speak to these issues. The Syran declaration is "window-dressing" and admits to issues that Plaintiff has not challenged and which are not relevant to this controversy. The letters were prepared to deceive the consumer by leading him or her to believe that the account was receiving special

attention and being collected by a high official of the company.

The act of sending out routine collection letters[1] under the false pretense of being not just from any commission-based collector, but directly from senior management is deceptive, and a reasonable inference is that the intent was to so deceive the consumer.

In the consumer debt collection process, a debt collector may not use any false or deceptive means in connection with the collection of consumer debt. 15 U.S.C. § 1692e. Nor may a collector send any document which creates a false impression as to its source, authorization, or approval. 15 U.S.C. § 1692e(9).

Further, Defendants falsely state on their collection letter that the law requires that they make a negative credit report, when in fact such a report has been made long ago by the original creditors, HSBC and Defendant MCM (Damaris decl., ¶¶ 1-12), and the law does not require subsequent notices. Defendants use this false threat to coerce payment, and doing so is an unconscionable means to collect a debt, in violation of 15 U.S.C. § 1692f.

For the reasons which follow, Plaintiff is entitled to summary judgment as to liability because the facts and law show Defendants violated the FDCPA. Defendants' summary judgment motion (Doc 16) is without substance and must be denied.

II. PROCEDURAL HISTORY

This action was commenced on November 8, 2007, by Plaintiff, Damaris Cruz's filing a class action Complaint against the defendant debt collectors under the provisions of the Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §§ 1692e, 1692e(9), 1692f.

Defendants filed their Answer on December 8, 2007.

On January 26, 2008, Plaintiff filed her motion for class certification. A hearing on that motion is set for April 4, 2008.

On February 15, 2008, Defendants filed the herein motion under F. R. Civ. P. Rule 56.

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[1]Plaintiff believes collection letters are a fact of life, and when used according to the law are proper.

III. STATEMENT OF FACTS

1. The Complaint alleges that Defendants violated the FDCPA because Defendant MCM's collection letters, attached to the Complaint as Exhibits A, C and E violated 15 U.S.C. §§ 1692e, 1692e(9), and 1692f.[2]

2. Specifically, Plaintiff contends, *inter alia*, that the inclusion of the name of A. Syran and his title of Senior Vice President, Operations and Marketing, as signator on the collection letters, raises questions as to the source of the letters, their authorization, in violation of 15 U.S.C. § 1692e(9).

3. Mr. Syran is not an attorney, and was not acting in the capacity of an attorney as signator on the three letters.

4. Mr. Syran is a real person whose title is accurately reflected in the collection letters attached to the Complaint as Exhibits A, C, and E.

5. Mr. Syran did not personally author or mail the subject collection letters to Plaintiff, Damaris Cruz.

6. Mr. Syran's Declaration does not state that he was personally aware that the MCM collection letters, attached to the Complaint as Exhibits A, C, and E, were mailed to Plaintiff on or about the date stated in the letters.

7. Mr. Syran's Declaration does not state that he personally directed his staff to send the subject collection letters to Plaintiff.

8. Mr. Syran, in his Declaration, does not state he had specific knowledge of the debts owed by the Plaintiff, or specific knowledge of the debt collection activity of MCM with respect to Plaintiff's debts.

9. The three collection letters attached to the Complaint as Exhibits A, C, and E identify the collection agency issuing the collection letters as MCM.

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[2]Defendant, throughout its motion, refers to the collection letter as a "settlement letter." Though the letter contains a settlement offer, it is nonetheless a collection letter under the FDCPA, and to designate it otherwise is incorrect.

10. The opening salutation on the letters reads: "Dear Damaris R. Cruz," and the letters are closed with "Sincerely, A. Syran, Vice President, Operations and Marketing."

11. The reverse side of the letters, Exhibits B, D, and F, states:

> As required by law, you are hereby notified that a negative credit report reflecting on your credit record may be submitted to a credit-reporting agency if you fail to fulfill the terms of your credit obligations.

12. The statement cited in Paragraph No. 11 is false, as the Defendant MCM and the original creditor had, long before sending the subject collection letter, issued negative credit reports on Plaintiff to the credit bureaus (Cruz declaration, ¶¶ 6; and 12B-C).

13. Further, the statement cited in Paragraph No. 11 is false as the law does not require the issuance of subsequent notices of an intention to file negative credit reports.

IV. LEGAL ARGUMENT

A. STANDARD OF REVIEW

In ruling on a motion for summary judgment, the Court does not weigh the evidence or find the fact. Rather, the court's role is narrowly limited to assessing the threshold issue of whether a genuine issue exists as to material facts requiring a trial. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

The 2007 Amendments to Rule 56 emphasize the breadth of the district court's discretion when resolving a summary judgment motion. The court must deny summary judgment when a genuine issue of material fact remains to be tried. See Rule 56, Advisory Committee Note to 2007 Amendments. The Court enjoys some measure of discretion to grant or deny the motion. Judgment may be denied when the factual records are disturbingly thin, or contain gaps that could be resolved by readily obtainable evidence, or where th e court concludes that a fuller factual development is necessary. See *Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 43 (1st Cir. 2007). See also *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 68 S.Ct. 1031, 92 L.Ed. 1347 (1948); and *Anderson v. Liberty Lobby, supra*.

B. HISTORY AND PURPOSE OF THE FDCPA

Congress enacted the FDCPA in 1977 after noting the "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors." 15 U.S.C. § 1692(a). Congress was concerned that abusive "debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of personal privacy." Congress found that means "other than misrepresentation" are available for the effective collection of debts. 15 U.S.C. § 1692(c). Early bills leading to the Act generally proscribed only "false or misleading" collection methods. The Senate added the provision prohibiting "deceptive" representations and collection means; several previous bills had contained language identical to 15 U.S.C. § 1692e(10) prohibiting the use of "deceptive means to collect or attempt to collect any debt. . . ." See, e.g., H.R. 10191, 94th Cong., 1st Sess. § 804 (1975), S. 656, 95th Cong., 1st Sess. § 806 (1977); S. 918, 95th Cong., 1st Sess. § 807 (1977); H.R. 13720, 94th Cong., 2d Sess. § 806(10) (1976)(Clearinghouse No. 31,059V); S. 3838, 94th Cong., 2d Sess. § 806(19) 1975)(Clearinghouse No. 31,059R).

This intention to avoid misrepresentation in debt collection practices was enacted into law by the general prohibition of 15 U.S.C. § 1692e against false, deceptive, and misleading collection practices, and by identification of specific deceptive acts in 15 U.S.C. § 1692e(1) through e(16).

The FDCPA is a strict liability statute where the degree of a defendant's culpability may only be considered in computing damages. *Bentley v. Great Lakes Coll. Bureau*, 6 F.3d 60, 63 (2d Cir. 1993). A single violation of § 1692e is sufficient to establish civil liability under the Act. *Id.* at 62.

The FDCPA is a remedial statute. The court thus construes its language broadly, so as to effect its purpose. *Cirkot v. Diversified Finsys*, 839 F. Supp. 941, 944 (D. Conn. 1993); *Bracken v. Harris & Zide, LLP*, W.L. 73594 (N.D. Cal. 2004).

The Ninth Circuit and almost all other circuits hold that the test for deception is whether the language in a collection letter may be deceptive as viewed by "the least sophisticated debtor."

Swanson v. South Oregon Credit Service, 869 F.2d 1222, 1225 (9th Cir. 1988). This standard requires more than simply examining whether particular language would deceive or mislead a reasonable debtor, but looks to the impression left upon "the least sophisticated debtor."

C. THE MCM LETTERS VIOLATE THE ANTI-DECEPTION PROVISIONS OF THE FDCPA.

1. 15 U.S.C. § 1692e

The collection letters in issue appear, on their face, to have been sent by A. Syran, Senior Vice President, Operations and Marketing. The opening greeting on each of the letters is: "Dear Damaris R. Cruz." The next several paragraphs request payment of the debt and offer a settlement. The collection letter then closes with "Sincerely, A. Syran, Senior Vice President, Operations and Marketing."

The Declaration of Mr. Syran filed with the Rule 56 motion of Defendants states the letters were sent by Defendant MCM. Mr. Syran does not state that he sent the letters, that he authored the letters, or that he had any involvement in the collection of the debt. He however admits that the letters bear his typewritten name and his title, at the bottom of the letter.

It is obvious that the letters were sent by MCM over the name of Mr. Syran to stimulate collection of the debt. Given this scenario, it is deceptive and misleading to the consumer to state or imply that a high-ranking officer of the company was sending Plaintiff a collection notice when that person had nothing to do with it. Common sense tells us that the relative position–or "rank"–of the signator of a letter does make a significant impact on those to whom a letter, whether a collection or other letter, is sent. At work, a message from the unit supervisor or the Executive Vice President of the company causes a reaction different from a message from a co-worker. This is not a "bizarre or idiosyncratic. . . interpretation" of the weight of a signature. To suggest otherwise is bizarre or idiosyncratic.

In ruling on a letter almost like those here, the federal District Court in the Eastern District of Pennsylvania, the Honorable Stewart Dalzell, presiding judge, analogized to lawyer collection letters, stating:

> But a lawyer is not the only figure who can get the debtor's knees knocking. An escalation from a lowly collection agent to a senior executive of the company could similarly demonstrate to a consumer that the debt collector means business. It is, of course, no accident that MCM used the names and titles of its executives on the collection letters at issue here. They expect, either based on research they may have conducted or just as a matter of common sense, that a title such as "President" or "Executive Vice President" connotes authority and is more likely to generate a response. *Lisa Y. Campuzano-Burgos v. Midland Credit Management, Inc.*, 497 F.Supp.2d 660, 663 (E.D. PA 2007)

This practice of misrepresenting the identity of the sender of a letter violates three separate provisions of § 1692e: it is false (the Senior Vice President, Syran, did not author the letter, § 1692e; it is deceptive (falsely suggesting high-level management involvement, § 1692e(10); and it creates a false impression as to source and approval, § 1692e(9). Because the letters can and would reasonably be read by the least sophisticated consumer to have been sent by the Senior Vice President, the letters effectively misrepresent the importance and urgency of the communication. The language is cleverly drafted to convey the impression that it is more than the run-of-the-mill collection letter, but one of special concern, from a vice president of the company.

15 U.S.C. § 1692e prohibits a debt collector from using "any false, deceptive or misleading representation or means in connection with the collection of any debt" (emphasis added). Each word of the statute is to be given effect. *TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001). Sending a collection letter to a consumer over the typed signature of a senior level official who had no involvement in the collection of the debt is deceptive, and for that reason violates the broad prohibitions of § 1692e. Plaintiff is entitled to summary judgment as to liability on violation of this section.

2. 15 U.S.C. § 1692e(9)

Additionally, Plaintiffs have pled that Defendants have violated § 1692e(9).

> The use or distribution of any written communication [by a debt collector] which . . . creates a false impression as to its source, authorization or approval. (15 U.S.C. § 1692e(9).

This sub-section, on its face and without the need for any judicial gloss, prohibits the very practice used by the clever draftsmen of collection letters sent to Plaintiff, Exhibits A, C, and E.

Our Ninth Circuit Court of Appeals has made clear that statutes are to be applied as written. "We must give effect to the plain meaning of the statute." *Camacho v. Bridgeport Financial*, 430 F.3d 1078, 1080 (9th Cir. 2005).

In this sub-section, Congress chose to focus not on objective falsity, as in § 1692e, but upon the "false impression" created in the consumer. This sub-section, as does much of the FDCPA, obviously draws upon the rich jurisprudence developed by the courts under the FTC Act for over half a century. *Clomon v. Jackson*, 988 F.2d 1314, 1318-19 (2d Cir. 1993) (observing that "Courts have incorporated the jurisprudence of the FTC Act into their interpretations of the FDCPA.. . . ." *Jeter v. Credit Bureau, Inc.*, 760 F.2d 1168, 1172-73 (11th Cir. 1985). The jurisprudential history of cases under the FTC Act includes instances where products and communications were alleged deceptive because they created a "false impression" in the consumer's mind. See, e.g., *Federal Trade Commission v. Colgate-Palmolive*, 380 U.S. 374 (1965); *Heredia v. Green*, 667 F.2d 392 (3d Cir. 1981). A false impression "can be made by words . . . which are literally and technically true but framed in such a setting as to mislead or deceive. . . ." *Doherty, Clifford, Steers & Shenfield, Inc. v. Federal Trade Commission*, 392 F.2d 921, 927 n.4 (6th Cir. 1968). Defendant is a real person who did indeed hold the upper management title "Vice President." However, Defendant Syran's signing of the collection letters creates a false impression of authorship and approval by "fram[ing] in . . . a setting as to mislead or deceive." Doherty, Id., at 927 n4.

There is no real debate about the facts: MCM sent out these collection letters over the name of a corporate executive, a real person whose title is accurately reflected in the collection letters in issue. Yet, Syran neither personally authored nor mailed the letters, nor was Syran even aware that the letters were mailed to the Plaintiff. Syran had no specific knowledge of the debts claimed due, nor of the debt collection activity of MCM with regard to Plaintiff's debts. These letters cannot be said to be "from" this executive in any meaningful way, albeit Syran lent his

name and imposing title to the collection letters.

Accordingly, the Court must deny Defendant's motion and grant Plaintiff's cross-motion.

D. DEFENDANTS' WARNING OF ITS LEGAL REQUIREMENT TO ISSUE A NEGATIVE REPORT IS A FALSE STATEMENT OF THE LAW.

1. Negative reports regarding Ms. Cruz had been made over 4 years prior to Defendants' collection letters.

Defendants' collection letters, dated from April 11, 2007 through July 4, 2007, warn of a legal requirement that a negative credit report may be issued to the credit bureaus for Plaintiff's failure to fulfill the terms of her credit obligations.

This collection tactic is false, because a negative credit report was issued by the original creditor, HSBC, in 2002 (Cruz declaration, ¶ 6), and Defendants issued a negative credit report in 2004 (Cruz decl., ¶¶ 12B and 12C).

The Plaintiff's credit report already bears the scars of her inability to pay the debt to HSBC.

2. The subsequent warning of further reporting is not required.

Defendant argues that the subsequent representation is allowed. Defendants cite to Cal. Civ. Code § 1785.26, arguing that the statute mandates the notification of a negative credit reporting (Motion 8:15-20). It is false to represent that the law requires a further report when the negative report has already been made.

The statute specifically precludes a requirement that additional notice be given. Defendant fails to cite to § 1785.26, which states:

> (b) A creditor may submit negative credit information concerning a consumer to a consumer credit reporting agency, only if the creditor notifies the consumer affected. **After providing this notice, a creditor may submit additional information to a credit reporting agency respecting the same transaction or extension of credit that gave rise to the original negative credit information without providing additional notice.** [Emphasis added.]

The California legislature, apparently alert to the zealous conduct and scare tactics of some debt collectors, issued a caution when it stated:

However, this section [Cal. Civ. Code § 1785.26] shall not be

> **construed to authorize the use of notice as provided in this section in violation of the federal Fair Debt Collection Practices Act.** Emphasis added.

Likewise, Defendants' argument based on 15 U.S.C. § 1681S-2(a) (Motion 8:5-7) is fallacious. The quoted section merely is a prohibition against reporting inaccurate information and identifies certain reporting duties. Giving notice as the Defendants have done is circumscribed by the California statute, Cal. Civ. Code § 1785.26, as well as the federal statute, 15 U.S.C. § 1681S-2a(7)Ai & ii, which states:

> **(7) Negative information.**
> **(A) Notice to consumer required.**
> **(i) In general**. If any financial institution that extends credit and regularly and in the ordinary course of business furnishes information to a consumer reporting agency described in section 1681a(p) furnishes negative information to such an agency regarding credit extended to a customer, the financial institution shall provide a notice of such furnishing of negative information, in writing, to the customer.
> **(ii) Notice effective for subsequent submissions**. **After providing such notice, the financial institution may submit additional negative information to a consumer reporting agency described in section 1681a(p) with respect to the same transaction, extension of credit, account, or customer without providing additional notice to the customer.**

Defendants' argument based on the Fair Credit Reporting Act and the California statute is wrong. The argument is unsupported by the clear language of the statutes.

Defendants' cited cases do not support Defendants' false representations as to credit reporting law. Defendants argue that their conduct is supported by three appellate court decisions[3] (see footnote 3). None of these cases consider the false statement made by Defendants that the law requires the negative credit report warning after notice has previously been given to the consumer, when the California and federal laws do not require additional notice and the negative reports have already been made.

Defendants argue the *Dunlap*[3] case implies a claim that Defendants name "Credit

---

[3]See *Dunlap v. Credit Protection*, 419 F.3d 1011 (9th Cir. 2005); *Durkin v. Equifax Check Servs., Inc.*, 406 F.3d 410 (7th Cir. 2005); *Wade v. Regional Credit Ass'n*, 87 F.3d 1098 (9th Cir. 1996).

Protection Association" suggests a credit reporting threat. The 9th Circuit Court said not so. The issue raised by Defendants' false report here was not involved in that case, and that case is not relevant.

The 7th Circuit *Durkin* case[3] is bereft of facts involving this case, and is no authority for Defendants' false statement that the law requires subsequent notice of a negative credit report.

The 9th Circuit, in *Wade*,[3] was not faced with the facts in this case. There, the Court stated:

> The body of the letter was informational, notifying the debtors that failure to pay could adversely affect her credit representation. There was no threat to take action that could not legally be taken.

The Court held the notice was informational.

Defendants, searching for support of their false statement regarding a legal requirement to notify of issuance of a negative credit report, has produced nothing, notwithstanding its argument and unrelated citations in its motion at pages 7-10 (Doc 16).

The representation that there exists a legal requirement to give subsequent notices of a negative credit report after issuance of the original notice is false and is a violation of § 1692e; and is an unfair and unconscionable means to collect a debt, in violation of § 1692f.

E. DEFENDANTS' INVENTION OF "STRAW MEN" ISSUES IS A DIVERSIONARY TACTIC.

Defendants, in their motion, present three false issues that are only distractions–"straw men" that Defendants set up and then knock over, one by one. These issues have been created by Defendants only as distractions.

> Invention One: The FDCPA was passed to prohibit harassment and abuse (Motion, p. 5).

The FDCPA was passed also to prevent deception, § 1692e-e(16). It was also passed to provide for verification of the alleged debt, § 1692g.

> Invention Two: Plaintiff alleges that the meaningful involvement test applied to lawyers should be applied against Defendant Syran (Motion, pp. 13-15).

Plaintiff does not argue that the attorney test be applied against Defendant Syran, other

than to show the effect an important person will have on a consumer.

> Invention Three: Plaintiff disputes the *bona fides* of the settlement offer (Motion, 2:1-2; 2:13-28; 3:1-8 11: 12-22, 11:23-26, 12:1-8).

Plaintiff does not dispute that the Defendants, in their collection letter, make a settlement offer.

These diversionary tactics are distractions from the serious issues raised by Plaintiff in her Complaint.

V. CONCLUSION

It takes only one violation of the Act to establish liability. Defendants' practice involves many more violations.

Plaintiff requests that Defendants' motion be denied, and Plaintiff's counter-motion for partial summary judgment be granted.

Respectfully submitted,

Dated: 2/27/08

/s/
Irving L. Berg